

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**VIRGINIA BALE**

Claimant

VS.

**HUTCHINSON HOSPITAL**

Self-Insured Respondent

Docket No. 1,003,853

**ORDER ON REMAND**

On November 8, 2007, the Kansas Supreme Court denied claimant's Petition for Review in the above referenced case. Thus, the Court of Appeals'<sup>1</sup> Order overruling the Board's decision and remanding this matter for further action must be addressed.

Pursuant to the Court of Appeals' ruling, there is a single issue that must be addressed. The Appeals Board was directed to implement the retirement offset embodied in K.S.A. 44-501(h). That statute provides as follows:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

By its express language, the claimant is entitled to the value of her functional impairment and no amount of offset can diminish that benefit. And the parties agree on the method of computing and value of claimant's functional impairment. Claimant's

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<sup>1</sup> Unpublished Court of Appeals Decision, No. 95,749, 158 P.3d, *rev. denied* Nov. 8, 2007.

functional impairment was found to be 25.5 percent to the whole body.<sup>2</sup> Claimant received 156.69 weeks of temporary total disability benefits at the rate of \$196.28 per week.<sup>3</sup> This yields a figure of \$30,755.11. Pursuant to the calculation mandated by the statute, K.S.A. 44-510e, claimant is entitled to 69.69 weeks of permanent partial disability payments at the rate of \$196.28 per week, for a total additional compensation due of \$13,678.75. All told, claimant is entitled to receive \$44,433.86 without any offset whatsoever.

During the pendency of this appeal (to the Board as well as to the Kansas Court of Appeals and ultimately to the Kansas Supreme Court) respondent paid claimant weekly benefits pursuant to K.S.A. 44-556(b). According to respondent, these payments commenced September 9, 2005, a date 10 weeks preceding the Board's November 17, 2005 Order and continued until the date the Supreme Court denied claimant's request for review, November 8, 2007. According to respondent, this period spans 114 weeks.

The parties are in agreement on the fundamental fact that in between the period that spans the Board's decision and the Supreme Court's ultimate denial of claimant's request for review, that benefits were paid at the weekly rate of \$196.28. While the parties' dates for these payments are not wholly consistent, it appears that there is no dispute that claimant received *at least* \$22,375.92 in additional compensation above and beyond the TTD that was paid.<sup>4</sup> This sum exceeds the figure owed in order to complete the payment of the functional impairment.<sup>5</sup> So, to the extent that excess monies were paid, respondent should be entitled to seek reimbursement by the Fund pursuant to K.S.A. 44-556(d)(1) unless additional funds are owed after the retirement offset is calculated.

The Board now turns to the seminal issue that was before the Court of Appeals, namely how to apply the statutory retirement offset set forth in K.S.A. 44-501(h). The ALJ made the following findings of fact with respect to claimant's social security payments:

. . . She [claimant] currently receives \$879.20 per month (\$202.89/week) in [s]ocial [s]ecurity retirement benefits. In 2004, she received \$845.60 per month (\$195.14/week); in 2003 she received \$828.20 [per month] (\$191.21/week); and in

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<sup>2</sup> This finding was originally found by the ALJ, affirmed by the Board and remains unaffected by the Court of Appeal's ruling.

<sup>3</sup> There was a slight underpayment of the TTD benefits and claimant acknowledges respondent has paid this underpayment.

<sup>4</sup> Claimant contends that she was paid \$22,837.18 over a period of 116.35 weeks while respondent maintains it paid claimant from September 9, 2005 to November 8, 2007, a period of 114 weeks. Because this is respondent's burden to establish any overpayment, the Board will adopt respondent's factual contentions instead of the overestimates provided by claimant.

<sup>5</sup> Based upon these figures, respondent has overpaid claimant by \$8,697.17 (\$22,375.92 actually paid less \$13,678.75 balance due on the functional impairment award).

2002, she received \$817.00 per month (\$188.54/week).<sup>6</sup>

He then went on to effectuate the offset as follows:

. . . In addition, there would be 74.02 weeks of permanent total disability benefits payable as follows: for weeks due in the calendar year 2003, permanent total disability benefits would be payable at the rate of \$196.28 per week, less social security retirement benefits of \$191.12 per week, or a net sum payable in 2003 of \$5.16 per week.<sup>[7]</sup> For the calendar year 2004, permanent total disability benefits would be payable at \$196.28 per week, less social security retirement benefits of \$191.14 per week, or a net sum payable in 2004 of \$1.14 per week.<sup>[8]</sup> For the calendar year 2005, permanent total disability benefits would not be payable, as the permanent total disability benefit of \$196.28 would be less than the social security retirement benefit offset of \$202.89. While claimant remains permanently and total disabled, as long as her social security retirement benefit exceeds her permanent total disability benefit amount, no additional sums are due [c]laimant.<sup>9</sup>

Based upon the the evidence contained within the record, the Board concludes claimant is entitled to the following payments:

156.69 weeks of TTD at the weekly rate of \$196.28 - \$30,755.11

69.69 weeks of PPD at the weekly rate of \$196.28 - \$13,678.75

Total sum (reflecting functional impairment only) - \$44,433.86

After the 226.38 weeks (TTD plus PPD weeks) is paid, claimant is entitled to PTD benefits at the rate of \$196.28 per week, less the offset compelled by K.S.A. 44-501(h). However, by the time the functional impairment portion of the Award was paid on May 29, 2005, claimant was already receiving a weekly retirement benefit that exceeded the value of her weekly compensation payment. Thus, based upon the language contained within the statute, claimant is not entitled to receive further benefits under the Kansas Workers Compensation Act.<sup>10</sup> Or as respondent has stated: "[a]s long as the weekly value of the claimant's Social Security retirement benefits exceeds \$196.28, no additional

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<sup>6</sup> ALJ Award (June 28, 2005) at 8.

<sup>7</sup> This totals \$268.32.

<sup>8</sup> This totals \$59.28.

<sup>9</sup> ALJ Award (June 28, 2005) at 14.

<sup>10</sup> And respondent is entitled to reimbursement of \$8,697.17 for the monies it paid claimant during the pendency of this appeal over and above the value of her functional impairment.

compensation will be owed to the claimant.”<sup>11</sup> Only if and when those retirement benefits decrease will she be entitled to the balance of her permanent total disability award.

Lastly, claimant has requested a review and modification of the Board's Award. Claimant couches her argument as follows:

According to the Court of Appeals, [c]laimant's uncontradicted evidence was not found to be trustworthy at least to the extent to support the fact that she was receiving social security retirement benefits at the time of her work related injury on January 25, 2001. Claimant still contends that these were in fact the benefits she received and would request permission to review and modify the award based on the showing of additional evidence from the Social Security Administration to support her position as to that portion of the award not yet due.<sup>12</sup>

As a party does not need the Board's permission to file for review and modification, essentially claimant must be requesting that the Board remand this case to the ALJ to reopen the record and allow her to admit evidence that was, for whatever reason, omitted from the original trial in this matter. The Board is unable to order a remand given the mandate from the Court of Appeals “to apply the offset”. Moreover, respondent objects to this request. Respondent's brief to the Board asserts that claimant should not be allowed to circumvent the procedures and due process involved in a review and modification proceeding by merely asking for a remand at this juncture of the proceedings. The Board agrees that there needs to be finality in the process.

Consistent with the mandate from the Kansas Court of Appeals, the claimant's Award is hereby modified as follows:

The claimant is entitled to 156.69 weeks of temporary total disability compensation at the rate of \$196.28 per week or \$30,755.11 followed by 69.69 weeks of permanent partial disability compensation at the rate of \$196.28 per week or \$13,678.75 for a 25.50 percent functional disability, making a total award of \$44,433.86.

As of January 28, 2008 there would be due and owing to the claimant 156.69 weeks of temporary total disability compensation at the rate of \$196.28 per week in the sum of \$30,755.11 plus 69.69 weeks of permanent partial disability compensation at the rate of \$196.28 per week in the sum of \$13,678.75 for a total due and owing of \$44,433.86, which is ordered paid in one lump sum less amounts previously paid.

Claimant is due no further monetary benefits as a result of her receipt of retirement benefits in excess of her weekly compensation benefit under K.S.A. 44-501(h) respondent

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<sup>11</sup> Respondent's Brief at 2 (filed Dec. 10, 2007).

<sup>12</sup> Claimant's Brief at 5 (filed Nov. 28, 2007).

is entitled to reimbursement of \$8,697.17 from the Fund.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant  
Kendall R. Cunningham, Attorney for Self-Insured Respondent  
Bruce E. Moore, Administrative Law Judge